Comments on the Grants at Supp. 259

Assume that O owns Blackacre in fee simple. What interests are created by the following grants? Note: "→" means a grant by a deed; "⇨" means a grant by a devise.

1. O → A and his heirs.

A has a fee simple absolute. O has nothing. "A's heirs" have nothing; the words, "and his heirs," are words of limitation, not words of purchase. This grant is the same as Number 4 below. It is also the same as a grant, "O → A in fee simple."

The phrase, "words of limitation," means "words of description." The words describe the *what* interest A has received. The phrase, "words of purchase," means "words that describe *who* has received an interest."

2. O ⇨A and his heirs. O is alive.

O has a fee simple. A has nothing. Wills do not become effective until the testator's death.

3. O → the First Baptist Church and its successors and assigns.

The First Baptist Church has a fee simple interest in Blackacre. Note that the words "successors and assigns" are words of limitation often used for corporate bodies, which do not have "heirs." Of course, as number 4 below indicates, the grant could create a fee simple in the Church just by reading O → the First Baptist Church.

4. O → A.

A has a fee simple absolute and O has nothing. In the older common law, A would have had a life estate and O would have had a reversion following A's life estate, because the words "and his heirs" were necessary to create a fee simple by grant. (Under the older common law, the words "and his heirs" were never necessary to *devise* a fee simple.) This rule has been modified by statute in all jurisdictions, so that a grantor is presumed to have intended to convey a fee simple (or if the grantor has less than a fee simple, the entirety of the grantor's interest) unless there is a strong indication otherwise. *See, e.g.*, Fla. Stat. § 689.10, Supp. 247-248.

5. O → A and B.

A and B have a fee simple interest in Blackacre. O has nothing. Note that *both* "A" and "B" are words of purchase, not words of limitation. That is, they give an interest both to A and to B. In what form would A and B own it: joint tenants, tenants in common, or by the entireties? There are common law presumptions. In addition, there are statutes in some states that govern this. *See, e.g.*, Fla. Stat. § 689.15, Supp. 249.

6. O → A for life.

A has a life estate. O has a reversion. What if O dies while A is alive. Then it would whoever held the reversion originally created in O. That might be someone O sold or gave it to, or it might a person to whom O devised the interested in his will, or it might be the person specified in the state intestacy statute if O died without a will.

7. O → A for the life of B.

A has a life estate *pur autre vie*. O has a reversion. *See* CB 280. It is a phrase from Law French meaning "for the life of another."

8. O → A for so long as B and C are both living.

A has a life estate *pur autre vie* — one that will expire when either B or C dies. O has a reversion.

9. O → A until both B and C are dead.

A has a life estate *pur autre vie* — one that will expire when both B and C have died. O has a reversion. Note how the condition that will cause O's reversion to vest in possession is different from that in No. 8.

10. O → A and her heirs so long as A is alive.

This grant has the form of a fee simple determinable (see No. 14 below), but it is likely that a court would say that A has a life estate, and O has a reversion. There are no magic words to create a life estate, and it seems most likely that O wanted A to have it only while A was alive, which in practice is what a life estate is.

What practical difference would the phrasing make? In the past, it might have made one difference for O. At common law, a possibility of reverter could not be alienated, and may not have been devisable, whereas a reversion could be alienated or devised. (Both, like all future interests, were inheritable, at least through intestate succession.) But today future interests generally are alienable and devisable as well as descendible by intestate succession. Some states — Florida is one of them — limit the duration of a possibility of reverter and "forfeiture" provisions to 21 years. *See* Fla. Stat. § 689.18, Supp. 249-250. Calling A's interest a life estate and O's interest a reversion might well exempt O from this provision.

11. O → my spendthrift nephew A and his heirs, but if A ever attempts to alienate, then to B and her heirs.

O has attempted to place a "forfeiture restraint" on A's fee simple. Forfeiture restraints on fee simples are invalid. Therefore, A has a fee simple absolute. O has nothing. B has nothing. In most states this would be the case. The policy concern is about maintaining the marketability of land – and especially not allowing one that would persist indefinitely Note, however, that the Restatement would permit some kinds of limited restraints on a fee simple. For example, under the Restatement a restraint on alienation for a short period

of time might be permissible, as might a restraint on alienation that is not total (e.g., giving someone a "right of first refusal."

12. O → A and her heirs, but A shall have no power to alienate it.

O has attempted to place a "disabling restraint" on A's power to alienate Blackacre. This restraint would be invalid. A has a fee simple absolute. O has nothing. Note, however, that the Restatement would permit some kinds of limited restraints on a fee simple.

13. O → A for life, but if A ever attempts to sell her life estate, then O shall have the power to reenter the property and take possession of it.

O has attempted to place a restraint on alienation of a life estate.

If the restraint is valid, A has a life estate subject to a condition subsequent. O has a reversion and a right of entry. If the restraint were not valid, A would have a life estate and O would have a reversion.

In general, the common law is more open to such restraints in the case of a life estate (as compared to a fee simple). The reason is that the restraint would not persist indefinitely, but would end with the life estate. In some states, courts would draw a distinction between disabling restraints on life estates and forfeiture restraints on a life estate. The former would be struck down but the latter would be upheld. With a disabling restraint, any attempted conveyance of the interest is simply void; the owner (here, A) retains ownership. With forfeiture restraint, an owner who violates it by attempting a conveyance does not succeed in conveying it to someone else (e.g., to X); but rather than being a nullity, the attempt to convey the interest results in its being forfeited to someone designated in the grant (here, O).

♦ *Final exam note*: You do not need to know the difference between a forfeiture restraint and a disabling restraint whether in connection with a fee simple, life estate, or any other kind of estate. You should, however, be aware that courts might be more open to upholding a restraint on alienation of a life estate because it does not last indefinitely as does a restraint on alienating a fee simple. Also, be careful in what you might identify as a restraint on alienation. As a practical matter, a grant like No. 6 or Nos. 21 and 22 might hinder marketability by making the land harder to sell. But there's nothing formally in them that restrains alienation, so courts would not deem those grants to have a restraint on alienation.

14. O → A and his heirs so long as a Democrat is President.

If the grant was made in 2022, A would have a fee simple determinable. O would have a possibility of reverter. With the recent election, as of January 20, 2025 (inauguration day), Blackacre would then revert to O (or to O's assignee or devisee or heir). O's possibility of reverter would be in fee simple. Note also that courts are not going to read a condition as capable of being revived. Suppose, for example, A owned Blackacre in fee simple determinable where the condition was that the land be farmed. If A ceased farming it then it would go to O. Even if A promised to go back to farming in the future, it

would still be O's. In No. 14 the condition is not related to land use, but a court would still be very unlikely to rule that the land would go back to A if a Democrat wins the presidency in 2024, out of a general concern for keeping land more marketable.

15. O → A and his heirs, but if a Republican is elected President, then O and her heirs shall have the right of reentry and repossession.

If the grant was made in 2022, A has a fee simple subject to a condition subsequent. O has a right of entry or power of termination. O would have the right to demand possession immediately upon the *election* of a Republican – note how the wording of the condition affects the point at which the future interest is triggered. But keep in mind that even after the recent election, A would continue to own Blackacre, with the full right to possess it, until O makes a demand. How might that relate to adverse possession if A continued to occupy Blackacre, and then 30 years later O first made a demand?

16. O → A for life, so long as she keeps up with her reading in property.

A has a life estate determinable. O has a reversion and a possibility of reverter. O will get Blackacre back when A dies, and might get it back sooner if A fails to keep up with her reading in property.

17. O → A and his heirs, so long as he remains unmarried.

O has attempted to create a fee simple determinable in A, reserving a possibility of reverter for himself.

Another possible read of this grant would be that A has a life estate determinable, in which case O would have a possibility of reverter (O might get it back if A marries) and a reversion (O would get it back when A dies never having married). The theory would be that the condition – not getting married – is relevant only while A is alive. Outside the context of dealing with marriage conditions, though, this is a pretty unlikely reading given the way the grant is written.

The condition could be held to violate public policy, which disfavors punishing marriage. If it could be shown that the main motive was to provide support until marriage, it might be upheld. As the casebook notes, one rather formalistic way to determine the motive is to look at the language. A court might read the fee simple determinable (or possibly life estate determinable) language as meaning support until A marries. In contrast, it might read a fee simple subject to a condition subsequent ("O → A and his heirs, but if he marries, then O shall the reenter and take possession") as penalizing A. How sensible or intelligible is the distinction?

It is also possible (though not inevitable) that a court would look at a condition on remarriage differently from one on marriage.

18. O → A for life, then to B and her heirs.

A has a life estate. B has a vested remainder in fee simple. O has nothing.

Suppose B dies while A is alive. B's will leaves "all my property to X." Then the state of the title to Blackacre will be: A has a life estate. X has a vested remainder. O has nothing.

This example shows that to describe the property interests at any particular point in time, you need to know what the facts are. To take another example, where O owns Blackacre in fee simple:

2016: O ⇨ A for life, then to B and her heirs. O is alive. This is the text of O's will as it relates to Blackacre. The state of the title to Blackacre is still: O has a fee simple, because a will has no legal effect until the testator (O) dies..
2023: B dies. B's will leaves everything to Z. O does not get around to revising his will. The state of the title to Blackacre is still: O has a fee simple.
2024: O dies. O's will takes effect. A has a life estate. Since B is dead, B's will determines who has the vested remainder. That person is Z, who has a vested remainder in fee simple.

You might ask, why wouldn't the phrase in the will, "then to B and her heirs" be considered a nullity if B dies before O's will takes effect? The answer is that O's will did not state a survivorship condition – i.e., it did not say, "O ⇨ A for life, then if B survives me, to B and her heirs." Consider the following:

2016: O ⇨ A for life, then to B and her heirs. O is alive. This is the text of O's will as it relates to Blackacre. The state of the title to Blackacre is still: O has a fee simple.
2022: A dies. His will leaves everything to Y. O does not get around to revising his will. The state of the title to Blackacre is still: O has a fee simple.
2023: B dies. B's will leaves everything to Z. O does not get around to revising his will. The state of the title to Blackacre is still: O has a fee simple.
2024: O dies. O's will takes effect. Y (A's devisee) has nothing. There is an implicit survivorship condition on a life estate: A must be alive at the time it is conveyed, which is 2024, when the will takes effect. That condition was not met. Thus the part of the will that leaves a life estate to A is a nullity. The next vested interest is the remainder. Since B is dead, B's will determines who has that interest. That person is Z. Z would have Blackacre in fee simple.

♦ *Final exam note*: We are assuming for purposes of the exam that all future interests are fully transferrable (by gift or sale), devisable (*i.e.*, by will), and descendible by intestate succession (i.e., in case of someone dying without a will).

19. O → A for life, then to A's children and their heirs.

This grant has an example of a "class gift." A has a life estate. If A has no children, then there is a contingent remainder in fee simple in A's children, and O has a reversion. The remainder, in other words, is to "A's children," however many there may be.

Upon the birth of A's first child, that child will have a vested remainder, subject to open, in fee simple, and O will have nothing. (If any child of A were to die while A is alive, what would happen to that child's interest? You would have to see who owns that vested remainder subject to open. In the case of a minor child you would have to look to the statute governing intestate succession, since minor children don't have wills.)

Contrast the remainder in No. 19 with the following:

(1) What if what follows "O → A for life" is "then to A's first born child?" Suppose A has no children. Then it is a contingent remainder in the first child born to A. If A has a child, then the interest becomes a vested remainder in A's first born child (an O has nothing).
(2) What if what follows "O → A for life" is "then to Alicia, Bandar, and Corrie," who are A's children at the time the grant is made? The three of them have a vested remainder. If A subsequently has a child Dante, that development has no effect on the ownership of Blackacre: A has a life estate and Alicia, Bandar, and Corrie share a vested remainder in fee simple. Dante has nothing. Suppose, further, that while A is alive, Bandar dies. Bandar's interest would not disappear. It would go to whoever his will left it to, or if Bandar died intestate (which would be the case if Bandar died while still a child), to whoever is designated as Bandar's heir under the state intestacy statute.
(3) Suppose the grant says "O → A for life, then to A's children,"as stated above. Even then, there might conceivably not be a class gift. A court might determine that what O meant by the reference to A's children was the three A had at the time of the grant (Alicia, Bandar, and Corrie). Then this would be like (2). It's a question of the grantor's or testator's intent.

You might wonder: what if, in (1) above, A's first born child were born after A died? In general that is not going to happen, of course. But suppose A is a man, and a child of his is born 8 months after his death? Would there be a gap between the end of A's life estate and the vesting of the remainder in A's first-born child? No; the common law deemed that child as having been born at the time of A's death.

What about frozen embryos that could be implanted decades later? In one sense, this, too, could be a question of O's intent. In general, though, courts would likely prefer not to keep a contingent remainder alive for many years under such a state of uncertainty. (Note also that when it comes to applying the "what might happen" approach to applying the Rule Against Perpetuities, courts are not going to include a frozen embryo scenario in their application of the Rule.)

♦ *Final exam note*: It's useful to be aware of the concept of a vested remainder subject to open (CB 327), but this label applies only to class gifts and I will not hold you responsible for class gifts on the final exam. Keep in mind, though, that on the exam you may encounter remainders in a particular child, or the first-born child, or someone's eldest child (or the same variations as to grandchildren, or nieces/nephews/niblings). These are not class gifts (and do not create vested remainders subject to open).

20. O → A for life, then to B for life.

A has a life estate. B has a vested remainder in a life estate. O has a reversion.

Suppose B dies while A is alive. B's will leaves "all my property to X." At this point, the state of the title to Blackacre would be: A has a life estate. O has a reversion. X would have nothing. X would have nothing because there is no such thing as a life estate measured by the life of someone who is currently dead. B's vested remainder would simply have disappeared when B predeceased A.

You might wonder – why not say that B has a contingent remainder in a life estate? In effect, there is a contingency to B's interest – B must outlive A for it to ever vest. Another way of putting it is that No. 20 might be written as follows: O → A for life, then if B survives A, to B for life. With this phrasing courts would say that A has a life estate. B has contingent remainder in a life estate. O has a reversion.

Does it matter which way we characterize No. 20? Probably not, practically, especially with the abolition of the Doctrine of Destructibility of Contingent Remainders (DDCR) (see CB 351-353). While the DDCR was in existence, characterizing B's interest as a vested remainder would protect it from the application of the DDCR. Even with the abolition of the DDCR, most courts would probably treat a grant phrased as in No. 20 as creating a vested remainder in B (in a life estate), if for no other reason than that no condition is expressly stated.

♦ *Final exam note*: You will not need to apply the DDCR on the final exam; you may assume the relevant jurisdiction has abolished it. You also do not need to know the Rule in Shelley's Case or the Doctrine of Worthier Title (CB 353-354). Nor, as noted above, will you need to deal with class gifts.

21. O → A and his heirs so long as the land is farmed, then to B and his heirs.

A has a fee simple subject to an executory limitation (or "fee simple on executory limitation", or "fee simple subject to an executory interest"). B has an executory interest, which will become possessory when the land is no longer farmed. O has nothing.

(Under the common law Rule Against Perpetuities, as we will see, B's executory interest is invalid. The common law approach is a "what might happen" approach, where courts ask whether, at the time the grant was made (or the will went into effect), a measuring life could be identified. A number of states have reformed or modified the common law approach. With reforms, though, a court applying the common law approach to the RAP would strike B's interest. That would mean that A has a fee simple determinable, B has nothing, and O has a possibility of reverter.)

♦ *Final exam note*: Calling the grant in No. 21 a "fee simple determinable in A and an executory interest in B" is wrong in terms of vocabulary and potentially confusing. You should give it the above labels. If it's utterly clear in an exam answer that you understand that this grant is different from the regular fee simple determinable, and that B's interest

is an executory interest (not a possibility of reverter or a remainder), it won't cost you any points if you say describe it this way. But using the wrong labels may make your answer a little unclear, and that could cost you some points. It's much better to memorize the correct labels.

22. O → A and his heirs, but if the land ceases to be used as a farm, then B shall have the power to enter and take possession.

A has a fee simple subject to an executory limitation (or "fee simple on executory limitation", or "fee simple subject to an executory interest" – any one of these different ways of labelling it is fine). B has an executory interest, which will become possessory when the land is no longer farmed *and* B attempts to take possession. O has nothing.

As we will see, under the common law Rule Against Perpetuities, B's executory interest is invalid. Applying the common law Rule, a court would hold that A has a fee simple absolute, and B and O have nothing. (Why is this a different outcome from the application of the RAP in number 21? The reason is that courts applying the RAP strike out everything that describes the interest that the RAP invalidates:

No. 21: O → A and his heirs so long as the land is farmed~~, then to B and his heirs~~.
No. 22: O → A and his heirs~~, but if the land ceases to be used as a farm, then B shall have the power to enter and take possession~~.

♦ *Final exam note*: Calling the grant in No. 22 a "fee simple subject to a condition subsequent in A and an executory interest in B" is wrong in terms of vocabulary and potentially confusing. You should give it the above labels. If it's utterly clear in an exam answer that you understand that this grant is different from the regular fee simple subject to an executory interest, and that B's interest is an executory interest (not a right of entry/power of termination or a remainder), it won't cost you any points if you say describe it this way. But using the wrong labels may make your answer a little unclear, and that could cost you some points. It's much better to memorize the correct labels.

23. O → A for 10 years.

In estates and future interest lingo, A has an estate for years and O has a reversion.

This is the same, though, as a term of years – one of the categories of tenancy we discussed in the section on landlord/tenant law. Because of some arcane rules pertaining to "seisin" in the older common law, though, O would have been said to have a fee simple subject to a term of years, and A, an estate for years. It makes no substantive difference today how we look at it.

♦ *Final exam note*: You will not need to apply what we cover in estates and future interests to landlord/tenant scenarios. Just apply landlord/tenant law.

24. O → A for life, and then 1 day after A dies, to B.

A has a life estate. B has an executory interest, which will become possessory one day after A dies. (It doesn't matter, but the executory interest would be called "springing.") O has a reversion in fee simple on executory limitation, which will give him Blackacre for one day upon A's death. Note that there is no way that this grant can be read as creating a remainder in B. There is a gap separating B's interest from the life estate; during that period (even if only 1 day), O holds it in fee simple subject to B's interest, meaning that B's interest would cut off the prior estate. Since B's interest is (a) created in a grantee, and (b) not a remainder, it must be an executory interest.

25. O → A and his heirs on A's 21st birthday.

A has a (springing) executory interest in fee simple, which will become possessory on A's 21st birthday. O has a fee simple on executory limitation.

♦ *Final exam note*: You are not responsible for distinguishing between "springing" and "shifting" executory interests. In general you *should* able to distinguish executory interests from contingent remainders. But I will apply the same approach to labels here as set out in No. 22.

26. O → A for life, but if B graduates from law school, then to B and his heirs.

Because of the "but if" language, the courts would likely read this grant as giving A has a life estate on executory limitation, with an executory interest in B, and a reversion in O. B's executory interest will become possessory the moment he graduates from law school, whether that is before or after A dies. O will get the property back in one of two circumstances: B dies without graduating, in which case O gets Blackacre in fee simple after A dies; or A dies while B is alive but not yet out of law school, in which case O gets Blackacre in fee simple on executory limitation.

27. O → A for life, then to B and her heirs if B graduates from law school. [Or: O → A for life, then to B and her heirs if B marries C.]

There are two ways to look at this, depending on the status of the DDCR. You are not responsible for applying the DDCR, but it might be helpful to your understanding of how estates and future interests work to see what difference its application can make.

1) We will assume that the DDCR has been abolished and is *not* in effect. All but a handful of states have abolished it. To determine how to characterize the interests, a court would need to decide what O intended:

a) If a court believed that O intended that A have Blackacre for life, and then whenever B graduated B would get Blackacre – *even if it was a number of years after A's death* – then the court would say that, as of the time of the grant, A has a life estate, and B has an executory interest that will become possessory either on A's death (if B has already satisfied the condition) or after A's death, upon B's graduation. O would have a reversion in fee simple subject to B's executory interest. This is probably the more

likely interpretation of O's intent. These are the possible scenarios under this interpretation for what could happen after the grant is made:

1. *Scenario 1*: A dies and B is still alive, and has not graduated from law school. B has an executory interest in Blackacre, and O (now that A is dead) has a fee simple subject to an executory limitation.
   a) In this scenario, if B graduates from law school, B's executory interest will become possessory, and B will have fee simple ownership of Blackacre; and O will have nothing.
   b) However, if B never graduates from law school, upon B's death, O's interest will convert from a fee simple subject to executory interest to a fee simple absolute.
2. *Scenario 2*: While A is still alive, B graduates. A still has the life estate. B now has a vested remainder. Why is it now called a vested remainder – whereas before B graduated, it was an executory interest? The reason is that B's interest now satisfies the three tests for being a remainder:
   a) It follows a life estate.
   b) It is *capable* of taking effect immediately upon the termination of the preceding life estate (there is no built-in gap—and indeed it is certain to vest in possession upon A's death); *and*
   c) It does not cut off the preceding life estate.

   It is not a *contingent* remainder because (a) it is in an ascertained person, and (b) since B has now graduated, there remains no condition that must be fulfilled for it to become possessory (other than A dying). Therefore it is vested. At the point at which it becomes vested the interests are: A has a life estate; B has a vested remainder; and O has nothing. [Note that this is the same set of interests as if, right after B's graduation, O had made a gift, "O → A for life, then to B."]. Once A dies, B will own Blackacre in fee simple.

b) It is possible, though less likely, that a court would interpret O's intent as follows: A was to have a life estate, and B would get Blackacre upon A's death if (but only if) B had graduated *while A was still alive*. Why might O have intended this? Perhaps O had in mind that A should have the pleasure of seeing B graduate from law school. If that's what the court believes O intended, it would characterize the interests as follows during the period while A is alive and B has not graduated: A has a life estate, B has a contingent remainder, and O has a reversion. Why a "contingent remainder" in B and not an "executory interest"? B's interest satisfies all three tests for being a remainder (see above), and there is a condition – B's graduation – that must be satisfied. These are the possible scenarios under this interpretation for what could happen after the grant is made:

1. *Scenario 1*: A dies and B is still alive, and has not graduated from law school. Because of what the court decides O intended, Blackacre would go back to O permanently, because B failed to graduate before A died. O would have a fee simple; B would have nothing.
2. *Scenario 2*: While A is still alive, B graduates. A still has the life estate. B now has a vested remainder. Why is it now called a vested remainder – whereas before B graduated, it was a contingent remainder? The reason is that B has now satis-

fied the condition. There is now no condition to B's interest becoming possessory (other than A's death).

3. *Scenario 3*: While A is still alive, B dies without graduating. At that point, A would have a life estate, and O would have a reversion. B's interest could never become possessory because the condition that B graduate could never be fulfilled; thus the contingent remainder in B would disappear.

2) What difference would it make if the DDCR were *not* in effect? Where the DDCR is in effect, courts treat a grant like No. 27 along the lines of b) above (*regardless* of what they think O intended). The older common law courts adopted the DDCR as a way of eliminating any contingent remainders whose conditions had not be resolved by the time of the life estate holder's death. This is because the older common law courts viewed contingent remainders unfavorably. Contingent remainders were seen as introducing uncertainty into land title, and so were more tolerated than welcomed.

When the Statute of Uses took effect in 1536 (CB 337-339), a new future interest – the executory interest – was created. The DDCR did not apply to these newly created interests, even though as a practical matter, executory interests look very much like contingent remainders.

♦ *Final exam note*: You will not need to apply the DDCR on the final exam; you may assume the relevant jurisdiction has abolished it. You do need to be able to distinguish executory interests from contingent remainders.

28. O → A for life, then to B's heir.

Here is good place to remind you that the facts matter, including what they are as of the time of the grant (as well as what happens subsequently).

Suppose, at the time of the grant, B is alive. Then courts would most likely say A has a life estate, and "B's heir" has an executory interest. O would have a reversion in fee simple subject to executory interest. This means that if when A died, B were still alive, it would go back to O, who would hold it in fee simple subject to the executory interest in B's heir's until B died and B's heir could be ascertained.

Suppose, at the time of the grant, B is dead. Then we would say A has a life estate, B's heir has a vested remainder, and O has nothing. Who is B's heir? We would have to look to the intestacy statute. And we might also have to track B's survivors down to who of them was both alive when B died and is highest of the statutory order of heirs, but we could definitely figure it out: "B's heir" (once B is dead) is entirely *ascertainable*. Note that if B had left no surviving relatives – unlikely, though possible – the state would get the interest under the intestacy statute.

In theory, an alternative interpretation of O's intent might result in a different characterization. If the court believed that O meant for "B's heir" to get Blackacre only if B's heir was ascertainable at A's death – i.e., only if B died before A – then we would say that A has a life estate, and there is a contingent remainder in B's heir, and a reversion in fee simple in O. This would mean that if when A died, B was still alive (so there was still no ascertainable heir), the contingency in the remainder – that B's heir be determined before

A dies – could never be fulfilled, and so Blackacre would revert back to O in fee simple. Since there could be no gap between A's death and B's heir taking the property, the interest in B's heir could be a remainder (and a contingent one at that). But this is a very unlikely interpretation of O's intent, in contrast to No. 27, where there is at least some explanation for 27(b).

♦ *Final exam note*: Do you always need to give two possible interpretations of O's intent and so two characterizations of the contingent future interest in the grantee, following a life estate, as either a contingent remainder or an executory interest (as in No. 27)? No, not always. You should do so only if there is a plausible explanation as to why the grantor (O) might have wanted the contingency in the future interest following the life estate to be resolved by the time of A's death. In an instance like this, there really isn't any.

Note that this is a different point from that made in the first paragraph of the explanation of No. 28. That is, it does matter what the facts are as of the time of the grant: Is B still alive when O makes the grant (or dies, if it's in a will), or is B dead at the time of the grant, so that "B's heirs" refers to some specific person who can be ascertained?

29. O → A for life, then if B marries C to B and his heirs, but if B doesn't marry C, then to D and his heirs.

A has a life estate. There are alternative executory interests in B and D.

What does O have? You might say nothing, because after A's death, either B or D is going to get it. Remember, there is no survivorship condition on D's interest, so even if D dies the day after the grant was made, and B and C remain unmarried to each other for 40 years and then both die, the alternative executory interests in D will still result in D's heir/devisee/grantee getting Blackacre.

Interestingly, the common law courts for many years during the time the DDCR was in effect would say that there's one other interest – O has a reversion. How could that be, since either way (B marries C or B doesn't marry C) it's going to end up in someone else's hands other than O (B or D)? First, when the DDCR was in effect, courts would treat a future interest in a grantee as a contingent remainder if at all possible. In this case, they would read it as alternative contingent remainders. (They could not do so if a gap was written in (like No. 24) or the future interest in the third part cut off a prior estate (as in No. 26). Second, where there were two alternative contingent remainders, they would attribute a revision to O. They would then subject the alternative contingent remainders to the possibility of being destroyed through one feature of the DDCR. That is, X could buy A's life estate while A was alive and B and C were alive but hadn't married (so the remainders in B and D were still contingent), and also buy O's reversion. The two interests – the life estate in A and the reversion in O – would then merge into a fee simple in X. Since the life estate in A would now have ended (by being merged into X's fee simple) before either of the contingent remainders had vested, they would be destroyed.

As noted, though, you're not responsible for the DDCR, so you may treat No. 29 as creating a life estate and alternative contingent remainders, with nothing in O.

Note that there is again, as in No. 27, a question regarding what O may have meant: (a) Did O mean that the condition (B marrying C) must be fulfilled during A's lifetime (so A had the pleasure of seeing B&C marry?); or (b) Did O mean that B (rather than D) should ultimately get it so long as B marries C at some point?

If (a), then there would be alternative contingent remainders in B and D.

If (b), the interests in B and D would be characterized as executory interests, as indicated above..

You should be able to work through the possibilities along the same lines as No. 27.

♦ *Final exam note*: There will not be any alternative contingent remainders or alternative executory interests (as defined here) on the final exam.

30. O → A for life, remainder to B if B survives A.

A has a life estate. B has contingent remainder. O has a reversion.

Note that at first glance, this might seem similar to No. 20. But there is a difference. While there is a condition that B survive A, if B does survive A, B will get a fee simple. That is, B's contingent remainder is a contingent remainder *in fee simple*.

31. O → X for life, then to A's children and their heirs. (Optional)

X has a life estate. If A has children, they have a vested remainder, subject to open, in fee simple. If A has no children, there is a contingent remainder in fee simple in the unborn children. O has a reversion, if the remainder is contingent.

When X dies, if A has any children, those children will be entitled to take possession. At that point, the class will close under the rule that it closes when any one member is entitled to possession. Any later-born children will not have an interest in the property. If A has no children when X dies, then what happens depends on whether the jurisdiction recognizes the DDCR

If, on the other hand, A dies before X, the class closes for a different reason: A can have no more children after he dies. (If A is a male then any children born 9 months later would be treated as if born before he died.) If A never had any children, the contingent remainder fails — because the condition precedent was not met, *not* because of the Doctrine of Destructibility of Contingent Remainders. Because O has a reversion, he will get Blackacre when X dies. If A did have children, their vested remainder, subject to open, in fee simple, will become a vested remainder in fee simple.

♦ *Final exam note*: As noted earlier, you are not responsible for class gifts.

32. O → A for life, then to B and her heirs, but if B forgets property, then to C and her heirs. (Optional)

A has a life estate.

B has a vested remainder, subject to divestment, in fee simple on executory limitation.

C has a shifting executory interest that will become possessory if A is dead and B forgets property.

♦ *Final exam note*: This is an example of a vested remainder subject to divestment (see CB 327-328). You are not responsible for vested remainders subject to divestment.